BRIEF IN SUPPORT OF THE PETITION.

Argument.

POINT I.

A decision of the Commissioner of Internal Revenue is not conclusive but only furnishes *prima facie* evidence of its correctness.

There is a well established rule of this Court to the effect that a deficiency assessment of the Commissioner of Internal Revenue is not conclusive, but is only *prima facie* evidence of its correctness, and that this is subject to review by the Tax Court of the United States and by the courts. *Wickwire* v. *Reinecke,* 275 U. S. 101; *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551; *Helvering* v. *Taylor,* 293 U. S. 507 Upon contesting the Commissioner's deficiency assessment the burden of proof is upon the taxpayer, but this burden can be overcome by the submission of evidence, and as pointed out in the case of *Helvering* v. *Taylor* (*supra*), the fact that the Commissioner's determination of a deficiency is arbitrarily made may reasonably be deemed sufficient to require the Tax Court to set it aside. This rule of law has been ignored by the Court below in its decision.

POINT II.

The findings of facts of the Tax Court of the United States are subject to review by the Circuit Court of Appeals to determine if they are supported by evidence.

Section 1141 of the Internal Revenue Code grants the Circuit Courts of Appeal and the United States Court of Appeals for the District of Columbia jurisdiction to review decisions of the Tax Court of the United States, and as part of that jurisdiction grants the power "to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a re-hearing as justice may require". This provision of the Code has been consistently interpreted by this Court to hold that the findings of facts by the Tax Court of the United States are conclusive unless unsupported by substantial evidence and that the question of whether there is sufficient evidence to support the findings of fact by the Tax Court is a question of law to be passed upon by the Circuit Court of Appeals. *Helvering* v. *Rankin*, 295 U. S. 123; *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200; *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481; *Colorado Nat. Bank of Denver* v. *Commissioner*, 305 U. S. 23; *Helvering* v. *Kehoe*, 309 U. S. 277. In the *Colorado National Bank* case both the majority and the dissent agreed on the principle enunciated above, differing only on the question of whether there was substantial evidence presented before the Tax Court to support its findings of facts. Notwithstanding the well established rule on this point, the Court in the instant case erroneously held that not only did

it not have power to review the decision of the Tax Court, but also the ruling of the Commissioner, stating, "we do not think it necessary to state the details of the business, for it is clear that such reductions as these are beyond the reach of our review".

POINT III.

A taxpayer is allowed to deduct reasonable salaries for personal services actually rendered to it.

Section 23 (a) of the Internal Revenue Code permits a deduction of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered". This section merely requires that a salary deduction be reasonable. The respondent's own regulations, Regulations 94, Article 23 (a) (6) confirms the correctness of this statement. As stated therein salaries which are reasonable and are in fact payments purely for services, may be deducted. There is no authority under the law and regulations for the doctrine enunciated by the Circuit Court of Appeals that a salary allowance made by the Commissioner is not to be interfered with unless "the allowance exceeds any possibly reasonable limits".

POINT IV.

The action of the Board of Directors of a corporation in voting salaries for any given period is entitled to the presumption that such salaries are reasonable and proper.

As held by the Circuit Courts of Appeals of the Fourth and Sixth Circuits, in determining the reasonableness of a salary deduction under Section 23 (a) of the Internal Revenue Code effect must be given to the action of the Board of Directors of a corporation, in setting salaries, to the extent of creating a presumption of their correctness. *Ox Fibre Brush Co.* v. *Blair,* 32 Fed. (2d) 42 (4th Circuit); *Toledo Grain & Milling Co.* v. *Commissioner,* 62 Fed. (2d) 171 (6th Circuit); *The Capitol-Barg Dry Cleaning Co.* v. *Commissioner* (6th Circuit), decided December 2, 1942, as yet not reported. As stated in the *Ox Fibre* case, this presumption must be construed in connection with the principle that the burden of proof rests upon the taxpayer. The taxpayer is still required to prove that the salary paid to its officers is both reasonable and necessary, but once having proved the type and nature of the services of the officers, the presumption then takes effect and the exact amount of the salary payment is presumed to be correct. The *Ox Fibre* case was before this Court and was affirmed in the case of *Lucas* v. *Ox Fibre Brush Co.,* 281 U. S. 115. While this Court did not discuss this particular presumption, the fact that it affirmed the decision of the Circuit Court of Appeals indicates that it was in concurrence with it.

POINT V.

The findings of facts of the Tax Court of the United States were contrary to the weight of the evidence.

In the instant case the respondent offered no evidence to support his disallowance, but on the contrary the uncontroverted evidence in the case fully established the correctness of the petitioner's salary deductions. The business of petitioner had been established by its two officers in 1912, and from a small beginning had been built up by them to the point where its volume was in excess of $2,600,000 annually, and where profits, after the deduction of officers' salaries, were $144,000 for the fiscal year ended June 30, 1937, and $211,000 for the fiscal year ended June 30, 1938. These officers were experienced in their fields and diligent in their duties. Prior to the depression they had drawn higher salaries than those involved in the instant case. Under the principles enunciated by the Circuit Court of Appeals of the Fourth and Sixth Circuits the petitioner is entitled to deduct the salaries paid by it to its officers.

CONCLUSION.

In view of the conflict of the decision of the Court below with various decisions of this Court, and the other circuits, and because of the widespread effect of the principles involved, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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